

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARIA S. ALVAREZ,

Petitioner,

v.

UNKNOWN, Warden,

Respondent.

Civil No. 12-0270 AJB (POR)

ORDER:

- (1) GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS; and**
(2) DISMISSING CASE WITHOUT PREJUDICE AND WITH LEAVE TO AMEND

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner has \$0.00 on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action as a poor person without being required to prepay fees or costs and without being required to post security. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

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FAILURE TO USE THE PROPER FORM

2 Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with
3 the Local Rules of the United States District Court for the Southern District of California. *See*
4 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be
5 submitted upon a court-approved form and in accordance with the instructions approved by the
6 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-
7 approved form.

FAILURE TO NAME PROPER RESPONDENT

Review of the Petition also reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

14 The warden is the typical respondent. However, “the rules following section 2254 do not
15 specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the
16 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
17 institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
18 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
19 be the state officer who has official custody of the petitioner (for example, the warden of the
20 prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

21 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
22 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
23 actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v.*
24 *Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
25 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
26 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
27 of Corrections for California have the power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d
28 at 895.

1 Here, Petitioner has not named any Respondent. In order for this Court to entertain the
2 Petition filed in this action, Petitioner must name the warden in charge of the state correctional
3 facility in which Petitioner is presently confined or the Director of the California Department
4 of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

FAILURE TO SIGN PETITION

In addition, Rule 2(c) of the Rules Governing Section 2254 Cases provides that “[t]he petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.” Rule 2(c), 28 U.S.C. foll. § 2254 (emphasis added). Here, Petitioner has failed to sign the Petition. Petitioner is advised that if she files “First Amended Petition for Writ of Habeas Corpus,” it must be signed.

CONCLUSION

12 For the foregoing reasons, the Court **GRANTS** Petitioner's motion to proceed in forma
13 pauperis and **DISMISSES** the Petition without prejudice and with leave to amend. To have this
14 case reopened, Petitioner must file a First Amended Petition **no later than April 13, 2012**. *The*
15 **Clerk of Court is directed to mail Petitioner a blank First Amended Petition form together
16 **with a copy of this Order.****

IT IS SO ORDERED.

19 || DATED: February 6, 2012

Hon. Anthony J. Battaglia
U.S. District Judge